

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
August 19, 2008 Session

**JOSEPH ANGEL SILVA, III v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Bedford County**  
**No. 10921     Donald P. Harris, Judge**

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**No. M2007-01193-CCA-R3-PC - Filed January 29, 2009**

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The petitioner, Joseph Angel Silva, III, appeals the denial of post-conviction relief by the Circuit Court for Bedford County from his conviction for aggravated rape, a Class A felony, for which he received a sentence of twenty-two years in confinement. He contends that (1) he received the ineffective assistance of counsel at trial, (2) he received the ineffective assistance of counsel on appeal, (3) his conviction was based on evidence obtained through an unconstitutional search and seizure, (4) his conviction was based on an unduly suggestive photographic lineup that violated his rights to due process, (5) the State's use of perjured testimony violated his due process rights, (6) his conviction was based on evidence obtained through compelled self-incrimination, and (7) his due process rights were violated pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Concluding that the petitioner has waived issues (2) through (7) because he did not present them to the trial court and that the petitioner has not demonstrated he received the ineffective assistance of counsel, we affirm the trial court's denial of post-conviction relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. McMULLEN, JJ., joined.

Robert T. Carter, Tullahoma, Tennessee (on appeal); and Donna Orr Hargrove, District Public Defender, and Andrew Jackson Dearing, III, Assistant Public Defender (at trial), for the appellant, Joseph Angel Silva, III.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Michael David Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

This court found the following relevant facts in its opinion affirming the petitioner's conviction for aggravated rape:

When [the victim] arrived at the bar [on May 14, 2003], [she] immediately ordered a beer. She continued drinking and talking with a man at the bar throughout the evening. Around 11:00 p.m. to 12:00 a.m., the victim decided she wanted to go home. She did not have enough money for cab fare and did not want to call her niece because it would cost money. She asked the man she had been talking to at the bar if he was going near her niece's house, and he said no. Soon after this exchange, the Defendant offered the victim \$12.00 for cab fare. The Defendant then offered to give her a ride home. The Defendant and the victim did not know each other prior to this conversation.

The Defendant and the victim got in his car and began driving. The victim and the Defendant were chatting, and the victim was not paying attention to where they were going. The Defendant pulled over to urinate. When he got back in the car, he grabbed the victim's head and put it on his still exposed penis and tried to force her to fellate him. The Defendant broke the victim's necklace and tore off her bra. He grabbed the victim from the passenger's seat and pulled her toward him. Her jeans were down, and she felt him vaginally penetrate her. The victim's head was hitting the back windshield as the Defendant had intercourse with her. She propped herself up on her hands to prevent this from happening and broke the ring on her finger. The Defendant also bit her shoulder.

The Defendant then flipped the victim over to penetrate her anally. He hit her in the head so hard that her upper plate of dentures was knocked from her mouth. Her flip flop shoes also came off her feet during the episode. At some point, she also lost her nose ring.

After raping the victim, the Defendant pushed the victim out of the passenger door and drove away. He left her standing in a parking lot, half-dressed, and missing her bra, flip-flops, upper denture and necklace. She stopped at a hotel and asked the clerk to call her sister. When her sister did not answer the phone, the victim began to walk toward Unionville. She was picked up by a driver of an eighteen-wheeler who drove her to Unionville. When she arrived in Unionville, an older gentleman gave her a ride to her sister's house.

Her sister found her crying on the front porch. The victim told her sister she had been raped.

The victim was then taken to the hospital. A rape kit was performed. Dr. Allen Honig examined the victim and observed multiple marks on her back [that] were bruises and contusions . . . consistent with being bitten. Both the vaginal and anal swabs and the smear slide taken as part of the victim's rape kit showed the presence of spermatozoa.

The police began an investigation of the case. A detective went to [the bar] and spoke with the bartender. The bartender was able to tell the detective the Defendant's name, where he worked, and the make and color of his vehicle. The detective located the Defendant's car at his place of employment and saw a bra with a torn strap on the rear floorboard behind the driver's seat. Another officer came out to help the detective. They informed the Defendant of the complaint, and the officers asked for permission to search the Defendant's car. The officer found the upper denture plate, the flip-flops, the gold necklace and the nose ring inside the car. The Defendant then voluntarily went to the police department. He admitted to giving a woman a ride and having consensual vaginal, anal and oral sex with her. He also admitted to leaving the woman stranded on the side of the road.

State v. Joseph Angel Silva, III, No. M2003-03063-CCA-R3-CD, Bedford County, slip op. at 2-3 (Tenn. Crim. App. May 25, 2005), app. denied (Tenn. Oct. 17, 2005).

At his post-conviction relief hearing, the petitioner testified trial counsel told him that she would win the case if he retained her and that it would be worthwhile to go to trial. He said that counsel received the names of two potential witnesses but that to his knowledge counsel never contacted either person. He stated counsel never spoke with him about the State's evidence. Although he claimed counsel never explained their trial strategy, he stated counsel had told him that she would call one witness. He said counsel conveyed a plea offer to him, which he said he rejected because he did not commit the crime. He claimed that except for the times he met with counsel to pay her fee, he only saw her in court for his appearances. He said that they spent no longer than thirty minutes discussing his case for trial. He stated he only found out that he would testify after the end of the second day of trial. He claimed counsel did not tell him the decision to testify was his and not hers, and he claimed counsel made the decision for him. He said that after counsel had exhausted his direct appeals, she sent him a letter in which she told him he should petition for post-conviction relief. He said that although counsel had given him an audiotape of one of his statements to the police, he said she and he never discussed the facts or circumstances of the statement.

On cross-examination, the petitioner admitted that he had been charged with other offenses and that none of his attorneys guaranteed winning those cases. While he insisted he took counsel at her word, he admitted he knew that the jury, and not counsel, would decide his guilt or innocence. He agreed that he had always told counsel the sex had been consensual. He stated he persisted in this claim even after he knew the police had found the victim's torn bra, upper dental plate, nose ring, and one sandal in his car. He admitted telling the police that they would find a bra in his car because he and a woman had had sex in his car. He admitted that counsel showed him a list of the State's potential witnesses, including the name of a physician, and that he knew the State would use his statement to the police as evidence. He said he knew that the State was going to use the items found in his car as evidence. He acknowledged that counsel had shown him some photographs of the victim's body, but he insisted he had not seen the victim's medical records.

The petitioner acknowledged that the two witnesses he wanted counsel to investigate, "Misty" the bartender and Scott Carroll, were not witnesses to the sexual acts but could only testify that they saw the victim and the petitioner together at the bar before she and he left. The petitioner admitted that the only witnesses to the sex acts were the victim and the petitioner. He stated that he wanted counsel to investigate Scott Carroll because the petitioner claimed the victim tried to go home with him before the incident. He admitted that he believed the sexual acts had been consensual and that he would not have accepted any plea offer. He stated he thought he would be acquitted at trial. He denied testifying on direct examination that he met with counsel for a total of thirty minutes and stated instead that none of his meetings with trial counsel lasted longer than thirty minutes.

The petitioner testified that he and counsel never discussed how to present their trial strategy of consent as a defense to the charge. He stated counsel never told him that the decision to testify was his decision, that she did not tell him he had the right not to testify, and that she did not tell him that he did not have to give evidence against himself. He said he did not remember the trial court addressing him while he was under oath regarding his decision to testify. He said the taped statement he gave to the police had been partially suppressed and that the part played in court during trial had been edited. On redirect examination, the petitioner testified that he and counsel spent no more than five to six hours discussing his case.

Cindy Lee Reece, the petitioner's sister, testified that after the jury had been selected, she spoke to counsel and gave her the names of potential witnesses. She said that counsel spoke with her one to two days later, when counsel said she had spoken to the bartender and did not want to use the bartender or the alleged other witnesses at trial. She stated that to the best of her knowledge, counsel had only spoken with the bartender.

Trial counsel testified that at the time of trial, she was licensed in Illinois and Tennessee and that she had formerly worked as both a federal and state prosecutor. She said that in 2003, approximately ninety percent of her practice was criminal defense work. She said she had not handled the petitioner's case before it had been bound over to the grand jury. She stated she had been retained and consulted with the petitioner while he was still in jail, but she did not remember

whether he had been indicted when she began representing him. She said she talked with him extensively about what he claimed occurred. She confirmed that the petitioner had always claimed the sex had been consensual. She said that she viewed his body and that he only had a healing hickey in the middle of his chest. She stated she filed a subpoena for the victim's hospital records once she learned of them. She said she filed a discovery request in which she received the petitioner's statements to the police and part of the victim's medical records. She stated she had received the complete medical records before she received the State's discovery. She said she obtained a list of the State's physical evidence. She stated that she showed the petitioner all this information, whether obtained from the State or independently. She said the victim's medical records reflected the victim's original description of her rapist as a bald man with a name differing from the petitioner's. She stated the petitioner had told her he was bald on the day of the incident. She said she had no way to find the person with the name given by the victim. She stated that while investigating the case, she went to the bar, which had closed at this point. She said she contacted the bartender, who told her that the defendant and the victim had been there at the same time, they had been drinking, and they left. She stated the bartender had no information about them after they left.

Trial counsel testified that the information given to her by the bartender only corroborated what the victim had said happened at the bar. She said the defendant told her what he drank. She said the bartender's potential testimony about the events at the bar would not have aided the defense. She said she went to the vicinity of where the victim had been left on the side of the road. She said that she walked to the hotel the victim passed and that she spoke to the employees there, but she said that no one at the hotel had talked to the victim. Counsel stated she learned the victim had gotten a ride from a trucker after walking, but she said the victim did not know the trucker's name or the license plate and that the victim could not describe it more precisely than an eighteen-wheeler. Counsel said she requested all information the State had on the trucker but that the State did not have any to convey. She said she learned the victim had been taken to her house by someone else, and she said that she subpoenaed this person. She said he testified at trial more sympathetically to the victim than anticipated. She stated she learned of this person before the State did. She said that she knew both of the physical evidence recovered from the petitioner's car one to two days after the incident and that the State was going to use this evidence at trial. She stated she obtained a favorable suppression ruling from the trial court regarding the petitioner's taped statement to police. She stated that she wanted to look at the petitioner's car for a possible suppression motion but that the petitioner had already gotten rid of it. She said the police said the petitioner consented to the search. She said the petitioner claimed the small car had speaker parts in it that could have caused the injuries the victim was claiming. She said that because the petitioner no longer owned the car, she could only view photographs of the car, which no longer had the speaker parts in it.

Trial counsel testified that the biggest obstacle for them to overcome was the petitioner's admission to the police that he and the victim had sex the night of the incident. She said she tried to investigate the names she received, but she said she did not remember anyone actually giving her the name of the co-worker the petitioner claimed was at the bar. She stated she remembered the petitioner's sister told her about the bartender after jury selection but did not think the petitioner's

sister had provided her with a name. She said she thought the relative had said only to talk to the bartender.

Trial counsel testified that she told the petitioner after the State's case-in-chief that the case was his word against the victim's. She said she advised him to testify to present his defense of consent. She said she gave the petitioner the choice to testify. She stated that if it had been her decision for the petitioner to testify, she would have told the court that her client did not want to testify but that she was advising it. She said she never guaranteed the petitioner she would win the case.

On cross-examination, trial counsel testified that she spoke with the petitioner, his parents, and his siblings. She said that if they gave her a name or phone number, she tried to contact this person. She said she called phone numbers that were no longer valid. She stated that she spoke to the people she could find. She said she worked with the petitioner's claim of consent and that even after the evidence showed otherwise, she still looked for ways to pursue the petitioner's claim.

At the beginning of the post-conviction hearing, counsel informed the trial court of the three issues the petitioner was pursuing: (1) trial counsel promised the petitioner she would win the case if the petitioner retained her; (2) trial counsel failed to communicate with the petitioner and to prepare him to testify at trial; and (3) trial counsel failed to investigate and to interview potential witnesses. The court ruled that the petitioner did not demonstrate he received the ineffective assistance of counsel. The court found that even if the petitioner had shown deficient representation, he had not proven prejudice to the petitioner. The court stated that the petitioner had failed to prove prejudice to his case from what he alleged was counsel's guaranteed acquittal. The court found that counsel communicated adequately with the petitioner and that counsel investigated the petitioner's case adequately. The court found that the only way to present the petitioner's consent defense was for the petitioner to testify at trial. The court found that even if the decision to testify had been counsel's, the petitioner did not demonstrate prejudice to his case, as the petitioner was the only other witness to the events claimed by the victim. The court held that the petitioner did not demonstrate by clear and convincing evidence that some evidence existed that (1) trial counsel did not investigate and (2) would have affected the outcome of the petitioner's trial. The court noted that the failure to present the testimony of Scott Carroll precluded the petitioner from demonstrating prejudice to his case. The court found that although the petitioner claimed he and counsel never discussed the facts and circumstances of his recorded statement, the petitioner did not demonstrate that something mentioned in this recorded statement was improperly admitted due to ineffective counsel. The court dismissed the petition.

The petitioner contends the trial court erred in finding the petitioner received the effective assistance of counsel at trial. He claims that trial counsel failed to investigate and to interview the truck driver who drove the victim later that night, other patrons at the bar, and the petitioner's co-worker who was also at the bar. He asserts that trial counsel failed to object at trial, failed to file pre-trial motions and motions in limine, failed to advise the petitioner regarding testifying, and failed to object to the admission of the presentence report.

The petitioner also contends the trial court erred in finding the petitioner received the effective assistance of counsel on appeal in that counsel did not pursue all the possible claims the petitioner wanted counsel to present to this court. He claims that appellate counsel's failure to raise these issues was not a tactical decision and that the failure to present these issues on appeal prevented the case from being reversed by this court.

The petitioner also claims the following constitutional errors merit reversal of his conviction: (1) the trial court erred in admitting evidence obtained through what the petitioner claims was an illegal search; (2) the petitioner was convicted on the basis of an unduly suggestive photographic lineup; (3) the State used what it knew to be perjured testimony; (4) the petitioner's confession violated his Fifth Amendment right to counsel; and (5) the petitioner's due process rights were violated when the prosecution failed to disclose favorable evidence as required by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). In his reply brief, the petitioner alleges that because the ineffective assistance of his trial and appellate counsel prevented him from raising these constitutional claims, he has not waived these grounds for relief.

The State asserts the petitioner has waived the claims that he could have presented to the trial court and that he raises for the first time on this appeal. See T.C.A. § 40-30-106(g) (2006); Cauthern v. State, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004). For the issues properly before this court, the State contends that the trial court properly dismissed the petition after finding the petitioner did not demonstrate both deficient performance and prejudice to the petitioner's case. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997).

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2006).

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 104 S. Ct. at 2068. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); see DeCoster, 487 F.2d at 1201.

We note the petitioner raises many issues on appeal, including specific examples of the claimed ineffective assistance of counsel at the trial and appellate levels, that he did not present to the trial court during the post-conviction hearing. We conclude the petitioner waived this litany of alleged constitutional violations. See T.C.A. § 40-30-106(g); T.C.A. § 40-30-110(f); Cauthern v. State, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004) (stating that "an issue raised for the first time on appeal is waived."). We will address on the merits the petitioner's claim of ineffective assistance of counsel consisting of the examples presented during the post-conviction hearing and raised on appeal: (1) trial counsel failed to communicate with the petitioner and to prepare him to testify at trial, and (2) trial counsel failed to investigate and to interview potential trial witnesses. See Joseph Hough v. State, No. E2004-02299-CCA-R3-PC, Hamblen County, slip op. at 4 (Tenn. Crim. App. Dec. 1, 2005) (holding that examples of the ineffective assistance of counsel "may provide a ground for relief" under Tennessee Code Annotated section 40-30-103).

First, the trial court found that trial counsel adequately communicated with the petitioner regarding the facts and evidence in his case and that the only way for the petitioner to present his claim of consensual sex was for him to testify. The evidence does not preponderate against this finding. Trial counsel testified that she conveyed to the petitioner all information she obtained through her own investigation and through discovery requests, including the petitioner's admission to the police that he had sex with the victim the night she was raped. The hearing testimony reflected that only the petitioner and the victim were witnesses to the events and that the petitioner's attorney informed the petitioner of the need to present his side of the story. The court noted that even if the petitioner had been able to demonstrate by clear and convincing that trial counsel deficiently advised him of his rights, the petitioner had not demonstrated the prejudice prong of ineffective assistance



of counsel. As he has not proven both prongs of ineffective assistance, he is not entitled to relief on this issue. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997).

Second, we note the petitioner did not present the testimony of the witnesses he claimed counsel failed to interview, “Misty” the bartender and Scott Carroll, or evidence of the edited statement used at trial that he claimed counsel failed both to investigate adequately and of which to inform him. Trial counsel explained the content of her interview with “Misty” and that the petitioner admitted that neither “Misty” nor Scott Carroll witnessed the sexual acts between the petitioner and the victim. A petitioner cannot demonstrate deficient performance and prejudice from trial counsel’s alleged failure to investigate a witness “unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called.” Black v. State, 794 S.W.2d 752, 757-758 (Tenn. Crim. App. 1990). The petitioner has not satisfied his burden to demonstrate by clear and convincing evidence that the testimony of “Misty” the bartender or Scott Carroll was material, obtainable by reasonable investigation, and helpful to his defense. As noted by the trial court, the petitioner also did not demonstrate by clear and convincing evidence that the portion of his statement admitted into evidence at trial contained something that an attorney acting within the “wide range of professionally competent assistance” would have investigated or pursued. Strickland, 466 U.S. 668 at 690, 104 S. Ct. at 2066. The petitioner is not entitled to relief on this issue.

The post-conviction relief petition alleging ineffective assistance of counsel was properly dismissed. Based upon the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, PRESIDING JUDGE